COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

Banner University Medical Center Tucson Campus, LLC, an Arizona corporation dba Banner University Medical Center Tucson; et al.,

v.

Defendants/Petitioners,

Hon. Richard E. Gordon, Judge of the Superior Court of Arizona, Pima County,

Respondent Judge,

and

Jeremy and Kimberly Harris,

Plaintiffs/Real Parties in Interest.

Jeremy and Kimberly Harris,

Plaintiffs/Cross-Petitioners,

Hon. Richard E. Gordon, Judge of the Superior Court of Arizona, Pima County,

Respondent Judge,

v.

Banner University Medical Center Tucson Campus, LLC, an Arizona corporation dba Banner University Medical Center Tucson; et al.,

Defendants/Real Parties in Interest.

No. 2 CA-SA 2019-0051

Pima County Superior Court
No. C20174589

(Hon. Richard E. Gordon)

AMICUS CURIAE BRIEF OF THE ARIZONA ASSOCIATION FOR JUSTICE/ ARIZONA TRIAL LAWYERS ASSOCIATION

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Amicus Curiae Arizona Association for Justice, also known as the Arizona Trial Lawyers Association, respectfully submits its amicus curiae brief.

Legal Argument

1. An employer can remain liable for an employee's negligence under the doctrine of respondeat superior even if that employee is dismissed from the litigation—as long as the dismissal is not on the merits.

We start with the Arizona Supreme Court's rule that "respondeat superior is applicable to the breach of a duty by a governmental employee or agent acting within the scope of employment." *Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 547 (1980). *See also Patterson v. City of Phoenix*, 103 Ariz. 64, 66 (1968) (A public entity is "liable on the theory of respondeat superior if the agent or employee acted within the scope of his [or her] employment.").

Suppose that, as here, a trial court dismisses an employee from a lawsuit, but that the dismissal only concerns the employee and is not on the merits. Why should the employer then be dismissed as a matter of law? Nothing about a rule like that is proportionate, logical, or fair. The best that can be said of it is that it is a relic of outdated formalism.

It is true that the 1945 *De Graff* opinion stated that: "'It is well established by a number of decisions in this state that where an action proceeds upon the theory that the relation of [employer and employee] exists between the defendants, and that the [employer] is liable solely because of the negligent acts of the

[employee], that a verdict in favor of the [employee] and holding the [employer] guilty of negligence relieves not only the [employee] but the [employer] from liability.'" *De Graff v. Smith*, 62 Ariz. 261, 265-66 (1945) (quoting *Inter State Motor Freight System v. Henry*, 38 N.E.2d 909, 912 (Ind. App. 1942)).

But as *De Graff* noted, even a verdict in favor of one employee does *not* bar a recovery against the principal "'where the evidence shows that the negligence of another [employee] who is not joined as a party, or who if joined as a party is not exonerated by the verdict, has caused the injury.'" *Id*. at 266 (quoting *Inter State*, 38 N.E.2d at 912)).

"It makes little sense," Judge Donn G. Kessler wrote in 2013 about that passage in *De Graff*, "to say those claims cannot proceed when the employee is named as a defendant and the claims are dismissed for a procedural misstep, but could have proceeded if the plaintiff simply did not sue the employee." *Angulo v. City of Phoenix*, No. 1 CA-CV 12-0603, 2013 WL 3828778 * 3 ¶ 13 (Ariz. App. July 16, 2013) (Kessler, J., specially concurring) (citing *Wiggs v. City of Phoenix*, 198 Ariz. 367, 371 ¶¶ 15-16 (2000) (In a respondeat superior case a plaintiff need not name the negligent agent or employee as a party.).

Judge Kessler's logic is impeccable. After all, a claimant can maintain a lawsuit against a public entity without ever suing its public employee. So it stands to reason that the claimant can maintain a lawsuit against that public entity if the

claimant *had* sued *both* that public entity *and* its public employee in the first place—and the public employee is then dismissed from the lawsuit without any determination on the merits concerning the public employee's conduct.

Even a dismissal with prejudice against a public employee should not preclude a vicarious-liability claim against the public employer, as long as the dismissal was not on the merits. After all, only issues that have been "actually litigated" are precluded. *Chaney Building Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986) (quoted and followed in *Kopp v. Physician Group of Arizona, Inc.*, 244 Ariz. 439, 440 ¶ 1 (2018)). *See also Restatement (Second) of Judgments* § 27 (1982) ("When an issue of fact or law is *actually litigated and determined* by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.") (emphasis added).

The law in this area too often values form over substance. For instance, a dismissal without prejudice of a lawsuit against an employee, even when the statute of limitations has expired, is not regarded as a dismissal on the merits that would prevent litigation against the employer. *Hovatter v. Shell Oil Co*., 111 Ariz. 325, 326 (1974). But what difference is there between a lawsuit dismissed with prejudice and a lawsuit dismissed without prejudice that cannot be pursued after dismissal because the statute of limitations has run? Both are as dead as a modern

politician's promise.

In the present case, and in the many cases like it, where there has been no adjudication on the merits against an employee, the employer should logically and fairly remain vicariously liable for that employee's negligence. That is consistent with the Arizona Supreme Court's venerable but still accurate explanation that "unless a voluntary dismissal is made upon the merits, it does not, as a rule, bar a new action on the same subject-matter." *Wetzler v. Howell*, 37 Ariz. 381, 385 (1930) (cited and applied in *Trabucco v. Cogan*, No. 1 CA-CV 18-0526, 2020 WL 260260 at *7 ¶ 37 (Ariz. App. Mem. Dec. Jan. 16, 2020)).

"When a termination or dismissal indicates the defendant is innocent of wrongdoing," this Court added in 2020, "it is a favorable termination; however, if it is merely procedural or technical, the dismissal is not a favorable adjudication on the merits." *Trabucco* at *7 ¶ 37 (citing *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 154 (App. 1997) (citing *Frey v. Stoneman*, 150 Ariz. 106, 110 (1986)). The principle that a procedural or technical dismissal (such as the one in this and similar cases) is not a favorable adjudication on the merits as far as the employer is concerned is fair, clear, and easy to apply. That is a principle that should apply here and in similar cases involving public employers.

2. Without an adjudication on the merits, an employee's dismissal from a lawsuit does not end the employer's vicarious liability.

In 2018, the Supreme Court disavowed *De Graff*, insofar as that case "and

its progeny conclude that a stipulated dismissal with prejudice 'operate[s] as an adjudication that [the dismissed party] was not negligent.'" *Kopp*, 244 Ariz. at 440 ¶ 1 (quoting *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274 (1971)).

In the 2018 *Kopp* opinion, the Arizona Supreme Court explained that:

> Collateral estoppel or issue preclusion is applicable when the issue or fact to be litigated *was actually litigated in a previous suit*, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and *actually did litigate it*, provided such issue or fact was essential to the prior judgment.
>
> When an issue is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated. However, in the case of a judgment entered by confession, consent or default, none of the issues is actually litigated. A judgment entered by stipulation is called a consent judgment, and may be conclusive, with respect to one or more issues, *if the parties have entered an agreement manifesting such intention*.

Kopp, 244 Ariz. at 443 ¶ 14 (emphasis in original) (quoting *Chaney*, 148 Ariz. at 573).

The ultimate case-ending effect of a stipulated dismissal with prejudice is the same as a dismissal with prejudice arising from failure to timely serve a notice of claim. Indeed, in a failure-to-timely-serve-a-notice-of-claim situation, as "in the case of a judgment entered by confession, consent or default, none of the issues is actually litigated." *Chaney*, 148 Ariz. at 573 (1986).

Kopp and *Chaney* are consistent with the reasoning in *Jamerson*, where this Court held that "a consent judgment" not on the merits "in favor of a principal does

not as a matter of law bar a claim against the tortfeasor agent." *Jamerson v. Quintero*, 233 Ariz. 389, 391 ¶ 8 (App. 2013). If a non-on-the-merits consent judgment against a principal does not as a matter of law bar a claim against the agent, by parity of reason a not-on-the-merits consent judgment against an agent should not as a matter of law bar a claim against the principal.

For the employees in the present case, there was no actual litigation or resolution of the merits of the claims against them. The fact that a statute of limitations against a public employee has run is irrelevant as far as the claim's actual merits are concerned. "A statute of limitations is not a determination of liability" because "it merely prevents the bringing of an action when pled as an affirmative defense." *Hovatter v. Shell Oil Co.*, 111 Ariz. 325, 326 (1975). When a case has been decided before a determination on the merits of an employee's liability, that particular employee's "liability cannot be presumed." *Id*.

3. Under the Arizona Tort Claims Act, there is no need to serve a separate notice of claim on a public employee to hold the public entity liable.

The Arizona Tort Claims Act's wording and structure support retaining respondeat superior liability against a public-entity employer even when its public employee is dismissed from a lawsuit against the public-entity employer where both it and its public employee were sued—as long as the dismissal was not an adjudication on the merits of the public employee's liability.

After all, the Arizona Tort Claims Act lets a claimant file a notice of claim

against the public entity *or* against the public employer. And so, when a claimant seeks to assert claims against a public entity *and* a public employee, the claimant must give notice of the claim to both the employee individually and to the employer. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 351 (App. 2007); *Crum v. Superior Court*, 186 Ariz. 351, 352 (App. 1996).

But under the Arizona Tort Claims Act, the claimant controls the claim. That is, the claimant may choose not to sue both the public entity and the public employee. Given that ability to choose whom to sue, a procedural inability to pursue the claim against the public employee has no effect on the viability of the claim against the public entity.

In particular, A.R.S. § 12-821.01(A) provides that people "who have claims against a public entity, public school *or* a public employee shall file claims with the person or persons authorized to accept service for the public entity, public school *or* public employee." (Emphasis added.) The repeated use of "or" in A.R.S. § 12-821.01(A)—and in other provisions of the Arizona Tort Claims Act—proves the Act is <u>disjunctive</u>.

And because the Act is <u>disjunctive</u>, a claimant may sue the public employee, the public employer, or both, as long as there has been timely compliance with the notice-of-claim rules. Key statutory provisions show the Act's disjunctive nature:

- "The claim shall contain facts sufficient to permit the public entity,

public school ***or*** public employee to understand the basis on which liability is claimed." A.R.S. § 12-821.01(A) (emphasis added.)

- "All actions against any public entity ***or*** public employee shall be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12-821 (emphasis added.)
- "A claim against a public entity ***or*** public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days." A.R.S. § 12-821.01(E) (emphasis added.)
- "Service of summons in an action against any public entity ***or*** public employee involving acts that are alleged to have occurred within the scope of the public employee's employment shall be made pursuant to Arizona rules of civil procedure." A.R.S. § 12-822(A) (emphasis added.)
- "Neither a public entity ***nor*** a public employee acting within the scope of his employment is liable for punitive or exemplary damages." A.R.S. § 12-820.04 (emphasis added.)

Indeed, the title of the 1984 Arizona Tort Claims Act—which is "Actions Against Public Entities ***or*** Public Employees"—confirms its disjunctive nature. *City of Tucson v. Fleischman*, 152 Ariz. 269, 271 (App. 1986) (emphasis added). Because the Act is disjunctive, and in particular because A.R.S. § 12-801.01(A) is

disjunctive, a claimant may serve a claim on the public employer, *or* on the public employee, *or*, for that matter, on both.

If a notice of claim is denied against one party, of course, the subsequent lawsuit can only proceed against the party that was properly and timely served with the notice of claim—not against both. *See Johnson v. Superior Court*, 158 Ariz. 507, 510 (App. 1988).

Here, Plaintiffs apparently filed a proper, timely notice of claim against a public-entity employer. That is enough to hold the public-entity employer directly liable for its own negligence *and* vicariously liable for the negligence of its public employees. After all, a public employee's conduct falls within the scope of employment if it is the kind the public employee is hired to perform, it occurs within the authorized time and space limits, and it furthers the public employer's business, even if the public employer has forbidden it. *McCloud v. State*, 217 Ariz. 82, 91 ¶ 29 (App. 2007). Finally, whether a public employee's tort is within the scope of employment is a question of fact. *Id*.

Conclusion

For claims against public-entity employers: "There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." *Stone v. Arizona Highway Comm'n*, 93

Ariz. 384, 392 (1963).

In the Arizona Tort Claims Act's preface, the Legislature "reaffirmed the now well-settled Arizona common law notion that governmental immunity is the exception and liability the rule, when it stated that 'the public policy of this state [is] that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state.'" *City of Tucson v. Fahringer*, 164 Ariz. 599, 600 n. 4 (1990) (quoting 1984 Ariz. Sess. Laws, Ch. 285, § 1(A)).

There has been no adjudication or determination on the merits that the relevant public employees in this matter were not negligent. Therefore, because of the respondeat superior doctrine, the public-entity employer remains liable under the Arizona Tort Claims Act's express terms and in accordance with the progressively evolving principles of Arizona principal-agent law expressed in such recent cases as *Kopp v. Physician Group of Arizona, Inc.*, 244 Ariz. 439 (2018).

That result is proper for this particular case, but more important for Amicus. It is also a principled result that will apply in all other similar cases.

DATED this 28th day of January, 2020.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
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